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90-1940

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRAPPER MINING INC.,
WYODAK RESOURCES DEVELOPMENT CORP.,
Petitioners,

v.

MANUEL LUJAN, JR.,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Dated: June 17, 1991

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE GOVERNMENT BREACHED THE CONTRACTUAL LIMITATIONS REGARDING FREQUENCY AND NOTICE WHICH IT IMPOSED ON ITS RIGHT TO UNILATERALLY READJUST THE COMMERCIAL TERMS IN ITS COAL LEASE AGREEMENTS WITH THE PETITIONERS, BY EXERCISING THE RIGHT AFTER TEN YEARS INSTEAD OF TWENTY YEARS AS THE LEASES PROVIDE.

II. WHETHER SECTION 6(a) OF THE FEDERAL COAL LEASING AMENDMENTS ACT OF 1976 (FCLAA) WAS INTENDED TO DIRECTLY CONVERT THE TWENTY-YEAR READJUSTMENT INTERVAL IN THE PETITIONER'S PRE-FCLAA LEASE AGREEMENTS TO TEN YEARS BY OPERATION OF LAW, WITHOUT NEED FOR A VALID READJUSTMENT OF THE LEASES ACCORDING TO THEIR ORIGINAL TERMS.

PARTIES

Trapper Mining Inc. was an appellant in No. 89-1372 in the Tenth Circuit Court of Appeals. Related parties, as defined in Rule 29.1, are the Williams Fork Company, Colorado-Ute Electric Association, Inc., Trapper Investments, Inc., the Salt River Project Agricultural Improvement and Power District, Tri-State Generation and Transmission, Inc., Pot Luck Mining, Inc. and Platte River Power Authority. General Electric Holdings, Inc. was also an appellant in No. 89-1372 but was granted leave to withdraw as a party because it had assigned its interest in the leases at issue to Trapper Mining Inc.

Wyodak Resources Development Corp. was the appellee in No. 90-8025. Related parties, as defined in Rule 29.1, are the Black Hills Corporation and Western Production Company.

Manuel Lujan, Jr., as Secretary of the United States Department of the Interior, was an appellee in No. 89-1372 and an appellant in No. 90-8025. Other appellees in No. 89-1372 were Neil Morck, former Colorado State Director of the Bureau of Land Management (presently H. Robert Moore), and Bruce R. Harris and R. W. Mullen in their capacities as Administrative Judges of the Interior Board of Land Appeals, Department of the Interior. In No. 90-8025, William H. Lee was an appellant in his capacity as Chief, Branch of Mining Law and Solid Minerals of the Wyoming State Office, Bureau of Land Management, Department of the Interior.

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MANUEL LUJAN, JR.
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioners, Trapper Mining Inc. and Wyodak Resources Development Corp., respectfully pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit in *Trapper Mining Inc. v. Manuel Lujan, Jr., et al.*, No. 89-1372, and *Wyodak Resources Development Corp. v. Manuel Lujan, Jr., et al.*, No. 90-8025.

OPINIONS BELOW

The opinion of the court of appeals is reported at 923 F.2d 774 (10th Cir. 1991) and is reprinted in Appendix A.

The United States District Court for the District of Wyoming entered two orders in *Wyodak Resources Development Corp. v. Manuel Lujan, Jr., et al.*, No. C89-0057J, one on cross motions for summary judgment and one on the defendants' motion to alter or amend the judgment. Neither order is reported. They are reprinted in Appendices B and C.

The opinion of the United States District Court for the District of Colorado in *Trapper Mining Inc., et al. v. Manuel Lujan, Jr., et al.*, No. 88-Z-1812, is not reported. The judgment of dismissal and transcript of its bench ruling are reprinted in Appendix D.

The final administrative decisions of the Department of the Interior were entered by the Interior Board of Land Appeals of the Office of Hearings and Appeals (IBLA). They are reported in *Wyodak Resources Development Corp.*, 106 IBLA 339 (1989), which is reprinted in Appendix E, and in *General Electric Holdings, Inc., et al.*, 103 IBLA 366 (1988), which is reprinted in Appendix F.

The final administrative decisions in both cases rely on the IBLA's decision in *Franklin Real Estate Co.* which is reported at 93 IBLA 272 (1986) and reprinted in Appendix H.

JURISDICTION

The judgments of the court of appeals were entered on January 15, 1991. Petitioners jointly filed a timely petition for rehearing, which was denied on March 20, 1991. The order of denial is reprinted in Appendix G. This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

STATUTORY AND LEASE PROVISIONS

These cases involve interpretation of section 7 of the Mineral Lands Leasing Act of 1920 (MLLA), 41 Stat. 439, as it was in effect when the petitioners entered into coal lease agreements with the United States in 1958 and 1959, and as it was amended by section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 90 Stat. 1087. From 1920 until 1976, section 7 of the MLLA provided:

> For the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to

the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than $1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods. The Secretary of the Interior may, if in his judgment the public interest will be subserved thereby, in lieu of the provision herein contained requiring continuous operation of the mine or mines, provide in the lease for the payment of an annual advance royalty upon a minimum number of tons of coal, which in no case shall aggregate less than the amount of rentals herein provided for. He may permit suspension of operation under such

> lease for not to exceed six months at any one time when market conditions are such that the lease cannot be operated except at a loss.

30 U.S.C. § 207 (1958). Section 7 was replaced by section 6 of FCLAA effective August 4, 1976. Subsection 6(a) provides:

> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

30 U.S.C. § 207(a) (1986).

The lease agreements were executed on the Secretary of the Interior's Form 4-696 in 1958 and 1959. The introductory paragraph states:

> This lease, entered into on [respective dates] by the United States of America, the lessor, through the Bureau of Land Management, and [respective lessees] the lessee, pursuant and subject to the terms and provisions of the act of February 25, 1920 (41 Stat. 437), as amended, hereinafter referred to as

> the act, and to all reasonable regulations of the Secretary of the Interior now in force which are made a part hereof,

Section 3(d) of the lease agreements states:

> The lessor expressly reserves:
>
> * * *
>
> (d) The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period. Unless the lessee files objections to the proposed terms or a relinquishment of the lease within 30 days after receipt of the notice of proposed terms for a 20-year period, he will be deemed to have agreed to such terms.

STATEMENT OF THE CASE

Statement of Facts

Trapper's predecessor, Utah Construction Co., and Wyodak, as lessees, entered into coal lease agreements with the United States acting through the Bureau of Land Management (BLM) as the lessor, on June 1, 1958, and May 1, 1959, respectively. Wyodak's lease is designated W-073289 and Trapper's leases are designated C-07518 and C-07519. Trapper and Wyodak have been producing coal from the leases at their respective mines in Colorado and Wyoming for many years, except that Trapper will begin production from lease C-07519 in the late 1990s.

The lease agreements were made pursuant to the Mineral Lands Leasing Act of 1920, 41 Stat. 437, 30 U.S.C. § 181, *et seq.* (MLLA). Section 2 of the MLLA, 30 U.S.C. § 201

(1958), authorized the Secretary of the Interior to enter into the agreements. Section 7 of the MLLA, 30 U.S.C. § 207, authorized the Secretary to set various terms and conditions in the lease agreements, including the rentals and royalties payable to the United States at or above certain minimum rates. Section 7 also provided that the duration of coal leases would be "indeterminate . . . upon condition of diligent development and continued operation of the mine or mines, ..." Coupled with the indeterminate duration, section 7 authorized, but did not require, readjustments of the terms and conditions of coal leases at twenty year intervals "as the Secretary . . . may determine, unless otherwise provided by law" at the end of any such interval.

The Secretary prepared a standard coal lease Form 4-696 pursuant to his leasing authority under the MLLA. Trapper's lease agreements were made on the October 1956 edition of the form and Wyodak's agreement was made on the December 1958 edition. The introductory paragraph of both editions states that the leases were entered into:

> . . . pursuant and subject to the terms and provisions of the act of February 25, 1920 [MLLA] (41 Stat. 437), as amended, . . . and to all reasonable regulations of the Secretary of the Interior now in force which are made part hereof,

The Secretary's form also provided for the United States' right to readjust terms and conditions at twenty year intervals. Section 3(d) reserved:

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of twenty years from the date hereof and thereafter at the end of each succeeding twenty-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period. Unless the lessee files objections to the proposed terms . . . within 30

> days after receipt of the notice of proposed terms for a 20-year period, he will be deemed to have agreed to such terms.

Congress amended the coal provisions of the MLLA extensively in 1976 by enacting the Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083 (FCLAA). Section 6 of FCLAA replaced section 7 of the MLLA entirely. *See* 90 Stat. 1087. Section 6 of FCLAA, 30 U.S.C. § 207 (1986), continued the Secretary's authority to set the terms and conditions of coal leases, but revised the limitations on that authority which had been imposed by section 7 of the MLLA since 1920. Section 6(a) provides for coal leases that:

> (1) have a term of 20 years, but can be extended thereafter by continuing production;
>
> (2) "shall be terminated" if they are not producing coal in commercial quantities at the end of ten years;
>
> (3) bear a royalty obligation to the United States of at least 12.5% of the value of coal produced by surface mining operations.

In addition, the last sentence of section 6(a) states:

> Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

On February 7, 1979, the Wyoming State Office of the BLM notified Wyodak that its lease would be readjusted on May 1, 1979. However, the Wyoming State Office failed to transmit proposed new terms to Wyodak within two years, as required by the Secretary's regulations. Therefore, the Wyoming BLM notified Wyodak in a letter dated February 7, 1983, that the government's right to readjust had been waived. The BLM's letter also notified Wyodak that the next readjustment opportunity would occur on May 1, 1999,

twenty years after the first one.[1] But, on April 27, 1987, the Wyoming BLM changed its position, notifying Wyodak that its lease would be readjusted as of May 1, 1989. Wyodak objected that the readjustment is not due until 1999 because the twenty-year interval remains in effect until it is changed by a valid readjustment, among other grounds. The BLM overruled the objection and readjusted the lease effective May 1, 1989.

Trapper's leases first became subject to the United States' right to readjust their terms and conditions on June 1, 1978. However, the BLM's Colorado State Office failed to give notice that it intended to readjust until September 12, 1979. That notice transmitted a new form entitled Coal Lease Readjustment, section 23(a) of which proposed the following condition:

> This lease is subject to reasonable readjustment of any conditions of the lease, including royalty rates, at the end of this readjustment period on May 31, 1988, and subject to readjustment at the end of each 10-year period thereafter.

Trapper's predecessor as lessee protested the proposed readjustment on the grounds that the notice was untimely because it was given after the first twenty year interval specified in the lease agreements, among others. The Colorado BLM rejected the protest and an appeal was taken to the Interior Board of Land Appeals (IBLA). Following the decision in *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982),

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[1] Several months earlier, the Wyoming BLM initially took the position that the next readjustment was due in ten years under virtually identical circumstances. But, it agreed that twenty years was correct after the lessee questioned its initial position. *See Chevron U.S.A. Inc., et al.*, 108 IBLA 96, 97 (1989). As in Wyodak's case, the Wyoming BLM reverted to the ten-year position in Chevron's case in 1986. *Id.*

the IBLA vacated the proposed readjustment along with several others in a consolidated opinion, holding:

> . . . where there was no notice prior to the end of the 20-year period from BLM to the lessee that readjustment of the lease terms was contemplated, we now must hold that BLM had no authority to belatedly readjust the terms in these coal leases as the several BLM decisions attempted to do.

Kaiser Steel Corp., et al., 63 IBLA 363, 367 (1982).

On remand in 1982 and through 1988, the Colorado BLM took the position that the next readjustment opportunity arose on June 1, 1988, while Trapper and its predecessor lessees asserted that the next opportunity does not arise until 1998 because the twenty-year interval can only be changed to ten years by a valid readjustment.[2] The BLM eventually overruled these objections in a decision issued November 18, 1987, and readjusted Trapper's leases effective June 1, 1988.

Decisions Below

Wyodak and Trapper appealed the respective readjustments to the IBLA, which upheld them in *Wyodak Resources Development Corp.*, 106 IBLA 339 (1989), and *General Electric Holdings, Inc., et al.*, 103 IBLA 366 (1988). Appendix (App.) A-41, *et seq.*; A-52, *et seq.*. Wyodak and Trapper then filed actions for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701-706, and for declaratory and injunctive relief in the U.S. District Courts for the Districts of Wyoming and Colorado, respectively. Both cases were decided on stipulated facts and cross motions for summary

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[2] The BLM's Utah State Office and the Solicitor's Office took the twenty-year position in 1982 through 1984 in a nearly identical case involving a lease held by Kanawha & Hocking Coal and Coke Co. *See* Record, Trapper's Appendix, Tabs I, J and K. The Utah BLM changed to the ten-year position late in 1985. *Id.* at Tab J, p. 1.

judgment pursuant to the courts' jurisdiction under 28 U.S.C. § 1331.

The Colorado court affirmed the readjustment in a bench ruling and entered its Judgment of Dismissal on November 9, 1989. App. A-33, *et seq.* Relying on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (*Bowen*), the court stated that Congress can change terms of contracts between the government and private parties by legislation. The court then held that the ten-year readjustment interval in section 6(a) of FCLAA was self-executing and applied directly to Trapper's leases on their twentieth anniversaries.

The Wyoming court reversed the readjustment of Wyodak's lease in its Order On Cross Motions for Summary Judgment dated December 20, 1989. App. A-23, *et seq.* The Secretary filed a motion under Fed. R. Civ. P. 59(e), submitting the Colorado court's decision, but the Wyoming court affirmed its prior ruling in favor of Wyodak. App. A-15, *et seq.* It held that the twenty-year readjustment interval in section 3(d) of Wyodak's lease was a condition like all others that could be changed to ten years only by a valid readjustment. It also held that the plain language of section 6(a) of FCLAA permitted no distinction between the ten-year readjustment interval and other mandatory terms prescribed for coal leases. It concluded, therefore, that the Secretary made an irrational distinction in claiming that the untimely readjustment in 1979 waived application of the other mandatory terms in section 6(a), but that he had no discretion to waive imposition of the ten-year interval.

Trapper and the Secretary appealed the respective judgments to the court of appeals pursuant to 28 U.S.C. § 1291, and it consolidated the cases for decision. Relying primarily on *Bowen* and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (*Merrion*), the court of appeals affirmed the Colorado judgment and reversed the Wyoming judgment, thereby affirming the 1988 and 1989 readjustments in both cases.

App. A-1, *et seq.* It first held that the "unless otherwise provided by law" proviso in former section 7 of the MLLA, and in section 3(d) of the leases, means Congress reserved the power: (1) to take away the Secretary's periodic right to readjust; (2) to circumscribe the Secretary's readjustment authority; and also (3) to directly readjust the leases by legislation. It then held that, although the Secretary "would have had no choice but to adopt the ten-year interval" had he timely readjusted the leases in 1978 and 1979, "the new interval automatically took effect then because the language [of the last sentence of section 6(a) of FCLAA] directly imposed it." App. A-10.

REASONS FOR GRANTING THE WRIT

The court of appeals' judgments raise an important, broadly applicable question of federal contract law which has not been, but should be, decided by this Court. That question is whether the federal government's commercial contractual obligations are enforceable according to principles of contract law, where sovereign legislative power is not impaired. The court of appeals disregarded contract principles and ignored the petitioners' claims that direct application of the ten-year interval by statute breached the agreed limitations on the government's readjustment right. It extended *Bowen* and *Merrion* to endorse the government's use of its role as sovereign to directly adjust its commercial contractual relationships to its advantage, even where that is unnecessary to preserve sovereign power and where contract principles would prohibit the abrogation.

This Court has not decided whether the rules of *Bowen* and *Merrion* apply without qualification to the government's commercial contract relationships, or whether contract law governs at least to the point of impairing sovereign authority. Review of the first issue presented is warranted because the judgments below have immunized the government from

enforcement of its obligations where only its commercial interests are at stake.

I. THIS COURT HAS NOT DECIDED, BUT SHOULD DECIDE, WHETHER THE GOVERNMENT MAY EXERCISE ITS SOVEREIGN LEGISLATIVE POWER TO DIRECTLY AMEND THE COMMERCIAL TERMS OF ITS CONTRACTS, TO ITS ADVANTAGE AND IN CONFLICT WITH CONTRACT LAW PRINCIPLES, WHERE ENFORCEMENT OF ITS CONTRACTUAL OBLIGATIONS DOES NOT IMPAIR SOVEREIGN POWERS.

The lease agreements imposed two sets of limitations on the United States' right as lessor, acting through the BLM, to unilaterally adjust terms and conditions to its liking. First, the introductory paragraph incorporated only the terms of the MLLA as it was in effect in 1958 and 1959, as the court of appeals correctly concluded. *See* App. A-3. That paragraph also plainly stated that it incorporated only the Secretary's regulations "now in force." The lease agreements, therefore, were not made subject to subsequent legislation or regulations by that paragraph.

The government also agreed to limitations on its right to unilaterally adjust terms in section 3(d) of the agreements. It stipulated that the lessees would be notified and have thirty days to object before proposed new terms became effective.[3] In addition, exercise of the right was limited to twenty-year intervals.

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[3] The notice requirement is a precondition to a valid readjustment, not merely advisory. The attempt to readjust Trapper's leases in 1979 was vacated due to untimely notice. *Kaiser Steel Corp., et al.*, 63 IBLA 363, 367 (1982); *see also Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949, 951 (10th Cir. 1982).

If these contractual limitations on the government's right to modify any lease terms are enforceable, then the next opportunity does not arise until 1998 and 1999 because no readjustment occurred in 1978 and 1979. The enforceability turns on the proper construction of the phrase, "unless otherwise provided by law."

The petitioners contend that the phrase must be construed to mean that Congress only reserved the power to preclude or circumscribe the Secretary's authority to readjust the lease agreements, not to directly modify conditions in specific leases by legislation. The court of appeals acknowledged that "[t]he lease agreements . . . created commercial relationships governed by contract law."[4] App. A-7. It also admitted that "unless otherwise provided by law" is an ambiguous phrase having at least three possible meanings. App. A-8. Two of those meanings are inconsistent.[5] In these

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[4] Likewise, this Court described a sovereign government as a "partner in [the lessee's] commercial venture" when it entered into a mineral lease with a private party, in contrast to its separate role as sovereign. *Merrion*, 455 U.S. at 138. It also noted that the United States' contractual rights and duties "are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934) (footnote omitted).

[5] The court of appeals' opinion demonstrates the inconsistency. In two prior decisions, it construed the phrase to reserve to Congress the power to take away or circumscribe the Secretary's readjustment authority. *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496, 501, n.9 (10th Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *Coastal States Energy Co. v. Hodel*, 816 F.2d 502, 505-06, n.6 (10th Cir. 1987); *see also* App. A-7 - A-8. In this case, the court construed the phrase to mean that Congress also reserved the power to execute the readjustment directly by legislation. App. A-9. The Court explained:

> If the Secretary had undertaken readjustments . . . in 1978 and 1979, he would have had *no choice* but to adopt the ten-year interval, ... Although the Secretary did not readjust at those times, the new interval automatically took effect then because the language [of section 6(a)]directly imposed it. (Emphasis added).

(footnote continues)

circumstances, the ambiguous phrase "should be construed most strongly against the drafter, which in this case was the United States." *United States v. Seckinger*, 397 U.S. 203, 210, 216 (1970) (footnote omitted). Accordingly, the proper construction is that Congress did not reserve the power to directly modify the twenty-year interval or any other terms in the petitioners' lease agreements by legislation.

The petitioners' construction is consistent with the rule that contracts should not be construed to immunize them from the sovereign legislative power of the United States. *Bowen*, 477 U.S. at 52-53. Unlike the State's claims in *Bowen*, the petitioners' position here does not effectively preclude Congress from enacting section 6(a) of FCLAA, nor the Secretary from imposing the terms it prescribes on the lease agreements. It merely requires the government to honor the frequency and notice limitations it placed on its right to change the twenty-year interval and other original conditions of the lease agreements. Moreover, the petitioners do not claim that the leases shield them from legislation on collateral matters, such as taxation, outside their commercial relationship with the United States as defined in the lease agreements. *Cf. Merrion*, 455 U.S. at 145-46.

The court of appeals, on the other hand, construed "unless otherwise provided by law" to be synonymous with Congress' reservation of the right to "repeal, alter, or amend" the statutes at issue in *Bowen* and the *Sinking-Fund Cases*, 99 U.S. 700 (1879). App. A-7. *See also National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 467, n.22 (1985). It has been clear for more than a century that Congress, by legislation, may directly modify the terms of contracts between the United States and other parties which are made pursuant to statutes reserving the right to

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(footnote continued)

App. A-10. If the ten-year interval applied automatically, then the Secretary had "no need" to impose it by readjustments in 1978 and 1979, rather than "no choice."

"repeal, alter, or amend" them. *Bowen*, 477 U.S. at 53. "That language expressly notified the [other party] that Congress retained the power to amend the law under which the [a]greement was executed and by amending that law to alter the [a]greement itself." *Id.* at 54 (footnote omitted). There would be no dispute in these cases if Congress had used "repeal, alter, or amend" in the MLLA in 1920, some forty years after this Court construed the phrase in the *Sinking-Fund Cases*.

But instead, Congress chose the phrase, "unless otherwise provided by law," to modify the Secretary's authority to readjust coal leases in section 7 of the MLLA. That ambiguous phrase does not equate to "repeal, alter, or amend." The court of appeals erred in effectively holding that the petitioners waived their breach of contract claims by accepting lease agreements containing "unless otherwise provided by law," on the assumption that it is synonymous with "repeal, alter, or amend."

This Court has not decided whether contractual limitations on the government's right to modify its commercial obligations, drafted by the government, are enforceable where they are modified by an ambiguous phrase such as "unless otherwise provided by law." That question is squarely presented in these cases. This Court should decide it because of two significant policy implications resulting from the judgments below.

The first policy implicated is the sanctity of the government's contractual obligations. This Court emphasized that policy in the *Sinking-Fund Cases*, stating:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

99 U.S. at 719. In dissent, Justice Strong traced the origin of that fundamental principle to Alexander Hamilton's comments to the Senate in 1795. *Id.* at 731. This Court acknowledged the continuing validity of that principle in *Bowen*, stating:

> [T]he Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, *see Perry v. United States*, 294 U.S. 330, 350-54 (1935); *Lynch v. United States*, 292 U.S. 571 (1934), ...

477 U.S. at 52.

The judgments below sweep that fundamental policy away by allowing the government to avoid its obligations based on its interpretation of an ambiguous phrase it drafted. This Court, not the court of appeals, should decide whether *Bowen* and *Merrion* are properly extended to allow the government to convert its contractual obligations into mere statutory policies, amendable at its will and without consent of the other party. *See National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. at 465-66.

Endorsement of the government's position also raises a question of basic fairness because its self-interest is at stake. The government gains a significant commercial advantage over the petitioners if it may impose FCLAA's terms in 1988 and 1989, instead of ten years later. The 12½% royalty will increase the revenue accruing to the government's side of the "commercial partnerships" by several hundred percent, among other advantages. Unlike cases involving social welfare programs such as *Bowen*, this Court has more closely scrutinized claims that a sovereign breached its contractual obligations when its financial self-interest would be served by invoking its sovereign powers to circumvent its commercial contracts. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977); *see also National R.R. Passenger Corp.*, 470

U.S. at 471, n.24. This is such a case where fairness requires that the government be held to a strict construction of the contractual readjustment limitations it imposed on itself in the lease agreements.

II. IF REVIEW OF ISSUE I IS GRANTED, IT SHOULD ALSO BE GRANTED ON ISSUE II BECAUSE OF THE MULTITUDE OF CLEAR ERRORS MADE IN CONSTRUING THE INTENT OF SECTION 6(a) OF FCLAA BELOW.

The second issue presented does not have as broad an impact or policy implications as significant as the first issue. If review of the first issue is granted, however, it should also be granted on the second because of the clear errors in statutory construction which support the judgments below. Petitioners will summarize the arguments they will present if review is granted on the second issue.

After holding that the government reserved the right to directly impose the ten-year interval by legislation, the court of appeals concluded that Congress intended to exercise that right by enacting the last sentence of section 6(a) of FCLAA. It based this conclusion solely on the language of that sentence,[6] interpreting it to say "that *leases* will be subject to readjustment every ten years after the first twenty-year period ends. The provision is self-executing: . . . ." (Emphasis added). App. A-10.

The actual language is:

> Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

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[6] The court of appeals did not rely on FCLAA's legislative history, but did state that one remark by Rep. Mink during the House floor debate supported its analysis of legislative intent. App. A-12 - A-13.

This sentence does not say that "leases" will be subject to readjustment at ten-year intervals, but rather that "*[s]uch rentals and royalties and other terms and conditions* of the lease will be subject to readjustment . . . ." (Emphasis added). The word "such" plainly refers to the lease conditions described in the preceding sentences of section 6(a). Those conditions include: (1) extendable primary terms of twenty years; (2) cancellation absent production in ten years; and (3) 12½% minimum surface royalties. The petitioners' lease agreements did not contain those conditions when FCLAA was enacted in 1976. Nor were they added by valid readjustments in 1978 and 1979. The last sentence of section 6(a), therefore, simply did not address the petitioners' pre-FCLAA leases. *See Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 784 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 47 (1990); *see also Franklin Real Estate Co.*, 93 IBLA 272, 278 (1986) ("[T]he language of FCLAA . . . provides no guidance concerning the readjustment period for pre-FCLAA leases."), App. A-78. Accordingly, the ten-year interval was not directly imposed by the plain language of that sentence.

Turning to FCLAA's design and legislative history, *see K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), neither supports the court of appeals' conclusion. FCLAA was designed to make existing leases subject to its new conditions in two situations, but only with the consent or at the request of the lessee. FCLAA, § 5(d)(5), 90 Stat. 1086, 30 U.S.C. § 202a(5) (1986) (inclusion in logical mining units); FCLAA, § 13(b), 90 Stat. 1090-91, 30 U.S.C. 203 (1976) (request for lease modification).

The legislative history is ambiguous. None of the committee reports on FCLAA discuss the question of whether the ten-year interval is intended to apply directly to existing leases, without a valid readjustment. The court of appeals inferred support from, but did not rely on, Rep. Mink's comment which it discussed in section III.B.2 of the opinion.

App. A-12 - A-13. But, the Interior Department's Solicitor found that comment ambiguous as it related to readjustment of pre-FCLAA leases. Solicitor's Opinion M-36939 at 6, 88 I.D. 1003, 1007 (1981). He also concluded that Rep. Mink misspoke when she said "ten year readjustment," instead of "twenty-year readjustment." *See id.* at n.6. Other comments made by Rep. Mink and Sen. Melcher in the floor debates suggest the intent to avoid the "sticky constitutional questions" implicated by direct application of FCLAA to existing leases. 121 Cong. Rec. 26378 (1975); 122 Cong. Rec. 488, 19377 (1976).

Moreover, the Secretary's interpretation is not entitled to deference in this case. *Cf. Chevron, U.S.A., Inc.*, 467 U.S. at 843-45. That interpretation is patently unreasonable because it makes an irrational distinction between the ten-year interval and the three other lease conditions stated in mandatory language in section 6(a). *See* App. A-19 - A-21. Also, the government's position was inconsistent for nearly ten years after FCLAA was enacted. *See, e.g., supra*, nn.1, 2. In addition, the government has a financial interest in the legal position it has taken. *See United States Trust Co. v. New Jersey*, 431 U.S. at 25-26.

CONCLUSION

For these various reasons, this petition for a writ of certiorari to the Tenth Circuit Court of Appeals should be granted.

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